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FILED
APR 30 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1225

APPROVED DEHYDRATING CO., INC.,
Petitioner,

v.

GOLDEN EAGLE FARM PRODUCTS, INC.

PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

J. BERTRAM WEGMAN,
Counsel for Petitioner.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Approved Dehydrating Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 343-346) is reported, 147 F. (2d) 359.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered January 23, 1945. A petition for rehearing duly made, was denied March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Section 347 (a), Title 28, U. S. C.).

Questions Presented

1. Whether a jury issue is created by only indirect and inferential contradiction of the testimony of wholly disinterested witnesses directly and positively establishing material facts, which testimony is not otherwise contradicted or impeached, nor in any respect incredible.

2. Whether a jury may arbitrarily disregard such disinterested, unimpeached and uncontradicted testimony.

3. Whether there was substantial evidence to support the jury's verdict in this case, and if not, whether the denial of the motion for a new trial was an abuse of judicial discretion.

4. Whether, in an action for the purchase price of merchandise, the substantive rights of the parties being governed by the law of the State of New York, the seller may recover without proof that the goods delivered conformed to the contract of sale.

5. Whether the Court below was in error in its approval of rulings of the Trial Court upon the admission of evidence.

Statement

This is an action to recover the agreed purchase price of liquid whole eggs sold by the respondent to the petitioner. The petitioner denied that the merchandise delivered was whole eggs, and alleged that in truth and in fact it was

an adulterated mixture; and counterclaimed for damages based upon a breach of warranty.

The substance of the counterclaim was that the petitioner, relying upon the warranties of the respondent, purchased liquid whole eggs from the respondent for the purpose of dehydrating them and delivering them in powder form to the United States Government pursuant to a contract between the petitioner and the Government. The respondent, instead of delivering liquid whole eggs, delivered an adulterated product which the petitioner, without knowledge of the adulteration, processed into egg powder. Upon tender of the powder, it was rejected, and was condemned by the Food and Drug Administration as misbranded and adulterated. The petitioner was ultimately permitted to dispose of it at a lower price, after relabelling to disclose the adulteration.

There was no dispute regarding the existence of an agreement that the respondent would sell and the petitioner would buy such quanitities of liquid whole eggs as would be required to fill petitioner's contracts with the United States Government for the delivery of spray-dried whole eggs. The price was fixed at 23¾¢ a pound. The respondent knew that the petitioner was purchasing the eggs to be dehydrated for delivery under Government contracts (R. 35, 40-41).

Following some small deliveries during March 1942, which the petitioner used to test its equipment and operating technique (R. 16-19, 53), a number of full-scale deliveries were made between March 27 and the first week of May, 1942, and were promptly paid for. They were dehydrated by a mechanical process, (R. 46-47, 98) in which no substance entered into the egg powder other than the liquid eggs supplied by the respondent (R. 68), and no change resulted other than removal of moisture (R.

98). The petitioner's entire operation was to receive the liquid eggs from the respondent, put them through the dehydrating process, pack the resulting powder in barrels, and store it until a sufficient quanitity should be accumulated to make deliveries under its contracts.

When the petition made its first tender of delivery of egg powder, the Department of Agriculture rejected it for deficiency in fat content (R. 334). A second tender, made before receipt of the first rejection, was also rejected for the same reason (R. 334).

On May 12, 1942, an inspector of the United States Food and Drug Administration met, upon its arrival at the petitioner's plant, the truck on which the day's shipment of liquid eggs was being delivered by the respondent to the petitioner. The eggs were in closed drums (R. 33, 139), which had been placed on the truck at the respondent's premises and had not been touched from that time until their arrival at the petitioner's plant (R. 209). The truckman who made the delivery was the respondent's truckman (R. 209). The inspector himself opened the drums and took samples at random (R. 139).

These samples were delivered by the inspector in person to the New York station of the Food and Drug Administration (R. 140, 145). They were there tested and analyzed by chemists of the Food and Drug Administration, who testified to their findings.

The percentage of total solids was higher, and the percentage of fat was lower, than normal (R. 146). Further analysis to determine the reason for the discrepancy disclosed the presence of reducing sugars in the proportion of 1.65% to 1.74% (R. 85, 146). This is approximately four times the normal sugar content (R. 88, 147) and showed necessarily that sugar had been added (R. 147).

It was testified that the addition of sugar to liquid whole eggs would lower the percentage fat content (R. 100), and specifically, that the quanity of reducing sugar found in the analysis of the sample of respondent's liquid eggs was sufficient to account for the fat deficiency reported by the Department of Agriculture in the defendant's product, i. e., 35.64% and 35.94% of fat, as compared with the minimum standard of 40% established by the Department (R. 102).

An analysis of samples of the petitioner's egg powder revealed the same type of sugar which had been found in the respondent's liquid eggs, in substantially the same proportion in which it occurred in the liquid eggs, calculated to a dried basis (R. 88, 99, 106). Neither the liquid nor the egg powder consisted of pure eggs (R. 195), but less than 90% of whole egg and at least 10% of a mixture of reducing sugars similar to corn syrup (R. 189, 195).

The liquid samples taken from respondent's truck were taken from one of the four lots for which the respondent sues in this action (May 12, 1942; see R. 5).

There was no contradiction of this positive evidence that the respondent's liquid eggs were adulterated.

The respondent's chemist testified to his examination of samples of petitioner's egg powder, taken from the warehouse (R. 216), and representing earlier shipments of eggs. His examination suggested to his mind the possibility of the presence of milk powder as an adulterant, but he did not state as fact or as opinion that milk powder was present (R. 231). His tests did not show the presence of lactose, or milk sugar, which would necessarily have been found if milk powder were present (R. 242). Nevertheless, allowed to testify upon the hypothesis that milk powder might be present, he stated that if it had been added as a powder to the liquid egg, it would have clogged the spray nozzles

(R. 227-228); and that if it had been put in as a liquid before spraying, the resulting product would have had to be homogeneous (R. 241).

He did not testify at all regarding the liquid eggs which were shown to have been adulterated.

This testimony as to the supposed impossibility of adulteration by the addition of milk solids to the liquid eggs, completely irrelevant as it was to any evidence produced by either party, was supplemented by a diagram prepared by the witness and introduced in evidence. The diagram was admitted in evidence over strenuous objection, upon the representation that it would be proved to be a plan of a typical spray-drying plant (R. 96), and that the method shown in the plan was the method adopted by the petitioner (R. 96, 97). That representation was never made good, but the exhibit was allowed to remain in evidence, petitioner's motion to strike being denied on the theory that it was offered to "indicate the general principles for the benefit of the jury" (R. 226). The witness had never seen the petitioner's plant, and did not know the type of equipment they had (R. 227). It was denied by the petitioner that this diagram was a counterpart of its plant, and it was testified that the nozzle shown was entirely different from petitioner's (R. 128, 135).

This witness was permitted, over objection, to conduct a demonstration before the jury, to show that the addition of levulose (a kind of sugar syrup) to liquid eggs would change their color and appearance (R. 218). There was no proof and not even any suggestion of the presence of levulose (which is quite different from the kind of sugar found in the eggs by the U. S. Food & Drug Administration experts) in either the eggs or the egg powder; indeed, there was proof to the contrary (R. 190-191; compare R. 229). In the demonstration, the witness added to liquid eggs a proportion of levulose at least three to four times as great as

the 10% adulteration which actually existed in the eggs in suit (R. 220, 221-222, 254). Surely this had no proper place in the trial. The jury may well have been thereby misled.

Respondent's officers testified that its egg-breaking operations were carried on by about twelve girls, under the supervision of Nathan Gray and Hyman Lazar (R. 261-262, 269). The latter was stated to be in the Army (R. 34, 261), and did not testify. None of the girls were produced, and there was no explanation at all offered or suggested for their absence. Gray testified only that *he* had never put anything into the liquid eggs (R. 270-271).

The case was tried before a jury. At the close of all the evidence, the petitioner moved for a directed verdict in its favor (R. 45, 299, 303), which was denied (R. 304). A verdict was returned in favor of the respondent. The petitioner moved to set aside the verdict and for judgment notwithstanding the verdict, and in the alternative for a new trial (R. 318). These motions were denied.

On appeal, the petitioner urged that the proof of adulteration of the liquid eggs before delivery to the petitioner was so direct and positive, and so completely unimpeached and uncontradicted, that there was no jury issue on that point; that there was likewise no issue as to the existence of the warranties alleged in the counterclaim, and consequently the verdict was not supported by any substantial evidence.

The Circuit Court of Appeals affirmed (R. 343-346), in its opinion suggesting some doubt as to the validity of the rule urged upon it by the petitioner, but holding that it need not be considered since there was "ample testimony which, at least in an indirect manner" contradicted the petitioner's witnesses. It held also that there had been no error in the admission of evidence.

Petitioner moved for a rehearing (R. 347-348) upon the ground that the Court had not applied the correct rule of

law as to the burden of proof, as established by the New York court, and pointed out that the contradiction referred to in the Circuit Court's opinion did not touch the petitioner's proof with respect to the May deliveries for which the respondent claims in this action. Rehearing was denied (R. 348), without opinion.

Reasons Relied Upon for the Allowance of the Writ

I

Despite the relative insignificance of the case, it presents a question of very great importance in the trial of issues in the Federal courts, upon which the decision below is in conflict with decisions in other circuits, and is contrary to the ruling of this Court in the case of *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333.

The essential point in controversy was whether the plaintiff had delivered liquid whole eggs to the defendant, in conformity with its contract of sale. Upon that point, the defendant, petitioner here, proved by competent and wholly disinterested witnesses that samples of the liquid eggs taken from the containers in which they had been placed by the respondent, before they ever reached the petitioner, were found to be adulterated.

There was no contradiction of this testimony.

There was, however, testimony from an expert presented by the respondent that he had examined samples of egg powder, produced in the petitioner's dehydrating plant from respondent's earlier deliveries of liquid eggs, and that in his opinion the adulterant which he thought might be present in the powder could not have been introduced before dehydration.

The Court below, like the Trial Court, treated this as sufficient contradiction of the testimony of petitioner's witnesses to create an issue for the jury. It put aside the

petitioner's contention that there was no contradiction, and no issue, saying "there is ample testimony which, at least in an indirect manner, contradicts what defendant's witnesses said."

The question is thus presented whether the jury may be permitted to infer a fact, in no way directly proved, in the face of positive and otherwise uncontradicted testimony of unimpeached wholly disinterested witnesses that the fact sought to be inferred does not exist. This Court held in *Pennsylvania Railroad Co.* v. *Chamberlain*, *supra*, that such an inference is not permissible, and on that ground reversed that judgment. The Circuit Court of Appeals for the Sixth Circuit, in *Winn* v. *Consolidated Coach Corporation*, 65 F. (2d) 256, and the Circuit Court of Appeals for the Fifth Circuit, in *Arnall Mills* v. *Smallwood*, 68 F. (2d) 57, rejected such inference for the reason stated, upon the authority of the *Chamberlain* case.

This direct conflict is emphasized by the fact that what the Court below refers to as indirect contradiction was at most only a secondary inference. The respondent's witness testified to certain characteristics which he found in the egg powder examined by him (R. 231, 232-233). He inferred, and stated as his opinion, that those characteristics showed the presence of foreign substances which could not have been in the liquid eggs before spraying (R. 241). But the egg powder which he examined was not prepared from the eggs for which the respondent sued, while the testimony of the petitioner's witnesses (the U. S. Food and Drug Administration employees) showed adulteration of the very eggs in suit. To regard the respondent's evidence as even indirectly contradicting their testimony, it is necessary to make the further inference, or assumption without proof, that what was true of the eggs previously dehydrated was also true of the eggs in suit.

II

An additional reason for the allowance of the writ is that the Court below has decided a question of local law in a manner contrary to applicable decisions of the State courts; although petitioner recognizes that this question by itself may be hardly important enough to justify urging this ground if no other were present.

The plaintiff, suing for the price of four deliveries of liquid eggs, was bound to prove that they conformed to the contract. There is no such proof in the record. The positive proof was that samples taken from one of the deliveries sued for were deficient in fat. Although the defendant offered the further proof, in verification and explanation of the deficiency, that there was adulteration, the ultimate fact was the deficiency.

Under the applicable decisions of the New York courts, the seller was not relieved of the burden of proving compliance with the contract because the purchaser had pleaded a counterclaim for breach of warranty. Some of the authorities are collected in the opinion in the case of *Frankel* v. *Foreman & Clark*, 33 F (2d) 83, 86. See also *Standard Rice Co.* v. *Klipstein*, 245 N. Y. 315, 318; *Beals* v. *Hirsch*, 214 App. Div. (N. Y.) 86, 94.

III

This case also presents a question concerning the admissibility of evidence, which is so closely related to the principal question above stated that it is believed to merit consideration for that reason if for no other.

The Trial Court permitted two separate visual demonstrations, with no basis in the factual proof, which the jury must have thought was evidence in contradiction of petitioner's proof, when in truth there was no contradiction.

Each was on a matter which was wholly foreign to the issues, but which the jury, having seen, may have mistakenly considered pertinent. In effect, the witness was permitted to confirm by this ocular evidence an opinion which, had it been given in response to a hypothetical question, would have been rejected as assuming facts contrary to the proof.

It is respectfully submitted that the Court here sanctioned such a departure from the accepted and usual course of judicial proceedings as to transcend the bounds of discretion.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., April 28, 1945.

APPROVED DEHYDRATING CO., INC.,
Petitioner,

By J. BERTRAM WEGMAN,
Counsel for Petitioner.

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